CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 167

UNION RURAL ELECTRIC ASSOCIATION, INC.,

Petitioner,

v.

PUBLIC SERVICE COMPANY OF COLORADO; THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO; RALPH C. HORTON, JOHN P. THOMPSON, AND JOSEPH F. NIGRO, MEMBERS OF SAID COMMISSION; AND COLORADO CENTRAL POWER COMPANY;

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

REPLY BRIEF OF RESPONDENT COLORADO CENTRAL POWER COMPANY

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I.

INTRODUCTION

This Reply Brief is filed by Respondent Colorado Central Power Company in opposition to the granting of the Petition for a Writ of Certiorari to the Supreme Court of the

State of Colorado. Clarification of some factual matters are included within the appropriate subjects of argument.

II.

ARGUMENT

A. FEDERAL QUESTIONS, IF ANY, WERE NOT TIMELY AND PROPERLY RAISED SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THE DECISION ON WRIT OF CERTIORARI.

The federal questions now suggested by Union Rural Electric Association, Inc., are raised for the first time in this Court. Union acknowledges on page 10 of its petition that it originally suggested the constitutional questions in its petition for rehearing before the Colorado Supreme Court. This attempt was ineffective as the federal questions constituted new subjects which could not be raised for the first time upon a petition for rehearing. Rule 118 of Colorado Rules of Civil Procedure provides:

> "A petition for rehearing shall . . . briefly state the points claimed to have been overlooked or misapprehended by the Court with proper reference to the particular portion of the record and briefs relied upon.
>
> * * * * * *
>
> "No answer will be permitted and no action will be taken save to grant or deny the rehearing."

Since the federal questions were suggested for the first time in the petition for rehearing, the questions could not have been overlooked or misapprehended. As these questions were not proper subjects of a petition for rehearing, the attempt to raise them on the petition for rehearing was a nullity under state law and is not a basis for the granting of the petition herein. *Radio Station WOW v. Johnson*, 326 U.S. 120.

Union failed to raise the constitutional questions now suggested even though admonished to do so by Colorado Statute:

> "The review shall not extend further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of the State of Colorado, and whether the order of the Commission is just and reasonable and whether its conclusions are in accordance with the evidence." C.R.S. '53, 115-6-15.

Having failed to comply with the procedural requirements in the Colorado District Court as prescribed by statute and in the Colorado Supreme Court as prescribed by rule, Union has no standing in this Court. *Hulbert v. Chicago*, 202 U.S. 275.

The Colorado majority opinion recites substantial and complete non-federal grounds for sustaining the decision; however, failure of Union to comply with the Colorado Statutes and Rules is an adequate state ground to support the Colorado decision in denial of the petition herein. *Stembridge v. Georgia*, 343 U.S. 541.

After suggesting questions raised by the Colorado decision, Union states on page 11 of its petition herein:

> "The dissenting opinion (of the Colorado Court) constitutes a fairly complete brief on behalf of Union."

This "fairly complete brief" is devoid of any reference to any federal question. The dissenting opinion appearing on pages 70a through 83a of Union's petition herein negatives Union's contention that federal questions are involved.

The "Certificate of Existence and Decision of Federal Question" which the petitioner filed herein some weeks

after its Petition adds nothing of substance. This Certificate by the Colorado Chief Justice, who was one of the dissenters to the Colorado decision, constitutes a cursory recitation that some questions were discussed. Even if this Certificate should be considered, its contents amounting to perfunctory recitations are insufficient to qualify a federal question. *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.*, 228 U.S. 596. Other statements as to what language the majority and minority opinions of the Colorado Court actually contain are superfluous. Apparently the Certificate does constitute an acknowledgment by the petitioner Union that the record before this Court is deficient for the granting of a writ of certiorari.

B. THE COLORADO SUPREME COURT HAS NOT DECIDED A FEDERAL QUESTION OF SUBSTANCE.

It is necessary to view Union's petition in the proper perspective. Union is no longer a rural cooperative in competition with public utility companies. Union voluntarily changed its status to that of a public utility company subject to regulation by the Public Utilities Commission of the State of Colorado. Therefore, Union's petition improperly represents the effect of the Colorado Supreme Court decision. Those rural cooperatives which do not petition to become public utilities are not affected. Those rural cooperatives which are not in conflict with public utility companies are not affected even though they petition to become public utility companies. The Colorado decision affects only Union, a former R.E.A. cooperative, which has an operation in conflict with two other electric public utility companies in the north Denver area.

The questions determined by the Colorado Commission and Courts involve regulation of the conditions existing in the area north of Denver caused by the overlapping op-

erations of three electric public utility companies. These are essentially local problems concerning the utility service in the area north of Denver. There is presented the familiar regulatory question as to which of several public utility companies should be permitted to serve a contested area. Such questions are for determination by the Public Utilities Commission of Colorado. No federal question is involved.

C. THE DECISION OF THE COLORADO COURT IS IN HARMONY WITH THE APPLICABLE DECISIONS OF THIS COURT.

The principles involving state public utility regulation and the rights of a public utility have been recognized by this Court. *Frost v. Corporation Commission*, 278 U.S. 515. Although the Colorado Court has not decided a federal question involving these subjects, the decision of the Colorado Court is in harmony with these established principles.

Union's petition has failed to comply with the provision of Section 1(a) of Rule 19 of this Court which prescribes the character of reasons to be considered in the granting of a writ of certiorari to a state court. Union has not indicated any federal question of substance decided by the Colorado Court which has not heretofore been determined by this Court. Union has not indicated any federal question of substance determined by the Colorado Court which is probably not in accord with applicable decisions of this Court.

Interpretation of the Colorado Statutes by the Colorado Court upon which the Colorado decision is based does not involve a federal question. Construction of these Colorado Statutes is a state question, the final decision of which rests with the Colorado Supreme Court. *Hebert v. Louisiana*, 272 U.S. 312.

III.

CONCLUSION

The Colorado Court has not decided a federal question of substance not heretofore determined by this Court nor has the Colorado Court decided any federal question not in accord with the applicable decisions of this Court. The subject Colorado decision is based upon the substantive and procedural law and rules of the state without involvement of a substantial federal question. To permit Union to submit federal questions to this Court in circumvention of the state court would violate the Rules of this Court. The petition for a writ of certiorari to the Supreme Court of the State of Colorado should be denied.

Respectfully submitted,

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